INDEX

PAGE

I. Introduction 1

II. Action of Pennsylvania Supreme Court Not Abridgment of Freedom of Press 2

TABLE OF CASES

Worcester County Co. v. Riley, 302 U. S. 292 (1937) 1

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. INTRODUCTION.

The petition filed in this case is based upon the proposition that the Pennsylvania Supreme Court, in affirming a judgment in the sum of $8,000. in favor of respondent, entered upon a jury's verdict in a libel action, has been guilty of a serious breach of the constitutional guarantee of freedom of the press. According to petitioner, the offense committed by the highest appellate court of the Commonwealth of Pennsylvania lies in its arbitrary and erroneous application of common law rules of evidence and civil procedure.

Respondent does not deem it necessary to defend or justify the action of the Pennsylvania Supreme Court. The opinion of that Court speaks for itself. Rather than undertake a consideration of the many contentions advanced by petitioner, this brief will be addressed solely to the question whether this Court should take jurisdiction to review the evidence in a libel action, make its own independent determination of the facts contrary to the verdict of the jury, and supplant its judgment for that of the State court as to the weight and sufficiency of the evidence.

Respondent believes this question supplies its own answer. However, in the last analysis, petitioner's real complaint is merely that the Pennsylvania Supreme Court has erred in the application of rules of evidence and procedure. In reply to this, suffice it to point out that "the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error, * * * or require that pronouncements shall be consistent": *Worcester County Co. v. Riley*, 302 U. S. 292 (1937).

II. THE ACTION OF THE PENNSYLVANIA SUPREME COURT WAS NOT AN ABRIDGMENT OF FREEDOM OF THE PRESS.

Petitioner seeks to have this Court assume jurisdiction on the ground that the action of the Supreme Court in affirming the judgment for respondent in a libel case transgressed the constitutional guarantee of freedom of the press.

Stripped of non-essentials, petitioner's complaint is that the Pennsylvania Supreme Court "erroneously and arbitrarily refused to apply the basic common law rules of evidence and civil procedure", and that its affirmance of the judgment constituted an "unwarranted action of a State court in abridging freedom of the press" (Petition, page 45). In so contending, petitioner asks this Court to "review the evidence in order to reach its own determination of the facts and to apply the proper common law rules of libel" (Petition, page 36).

While it is possible to conceive of a case where a State court, in the application of the law of the state, has acted so arbitrarily and capriciously as to give rise to a constitutional question, certainly the instant case does not fall within such category. It is an ordinary libel action based upon an editorial published by petitioner wherein respondent, among other things, was depicted as a "Naziphile" and in sympathy "with liquidation of Jews." The damaging effect of this accusation is evident. It was published in the Philadelphia Record of April 18, 1941, at a time when the war in Europe had been in progress for a period of approximately eighteen months. Furthermore, the publication necessarily constituted a dire reflection upon respondent's reputation as a newspaper columnist in charge of the Washington office of the New York Daily News.

Under the law of Pennsylvania, petitioner, by way of defense, had the absolute right to plead *truth*. However,

petitioner avoided the entry of such a plea and limited itself to a plea of *privilege*. Petitioner sought to prove that the editorial was published upon a proper occasion with a proper motive and with reasonable and probable cause for belief in its truth. In support of this defense, petitioner introduced in evidence statements which respondent purportedly had made to other newspaper men in the course of casual conversations, which these men had relayed to J. David Stern, petitioner's President and Publisher. That respondent had conversed with these men was not denied. However, his version of what he had said differed materially from their testimony, and he denied that he had expressed sympathy with "liquidation of Jews." As a matter of fact, petitioner concedes that respondent "did not *in haec verba* admit that he sympathized with the 'liquidation of Jews'" (Petition, page 22). Consequently, there was presented a factual issue falling within the province of the jury for determination. The verdict of the jury resolved the facts in respondent's favor.

This case was tried on two different occasions. On the first, the jury found a verdict for respondent in the sum of $50,000. A new trial was granted. The second trial resulted in a verdict of $25,000. The trial court, on the ground that the verdict was excessive, ordered the grant of a new trial unless respondent filed a remittitur of all the verdict in excess of $8,000. This respondent did, and judgment was entered in his favor in the reduced amount. On appeal, the Pennsylvania Supreme Court affirmed, stating with respect to petitioner's contention that respondent's own admissions under cross-examination established privilege as a matter of law: "It was the duty of the jury to find what the witnesses said and what they meant and whether the defense of privilege was made out" (R. 387). This has none of the characteristics of arbitrary or capricious action. The jury is the fact-finding body, and the Pennsylvania Supreme Court very properly so ruled.

In reality, petitioner is urging this Court to superimpose its judgment upon that of the Pennsylvania Supreme Court

as to Pennsylvania rules of evidence and civil procedure; and, in addition, to invade the province of the jury in the determination of issues of fact. To say the least, this is a novel and unprecedented request. If granted, it would mean that this Court would be deluged with petitions for writs of certiorari in libel and slander cases.

In conclusion, respondent calls this Court's attention to petitioner's statement: "Were this court to review every case in which it is alleged that without due process of law a defendant has been deprived of property or liberty or in which he suffers a money judgment because of an alleged libel committed by him, it would indeed be harassed with a multitude of questions with which the United States Supreme Court should not be burdened and with respect to which the decisions of the state court of last appeal should be accepted as final" (Petition, pp. 19, 20). Respondent fails to see what there is in the instant case which makes this observation inapplicable.

Petitioner seeks to extricate itself by characterizing the case as follows: "Where, however, in a rare instant such as this, a punitive sanction, by way of a money judgment, is unjustly imposed by a state court upon the courageous performance by the press of a public duty in a time of national crisis when the peril of a premature declaration of war threatens the nation, it is submitted that there can be no doubt of the right and power of this court to assume jurisdiction" (Petition, page 20). Fortunately, under the law of this land, the right of an individual to protection from defamation does not contract and expand dependent upon the condition of world affairs. The press is not endowed with a public duty to defame individuals.

For the reasons above-discussed, the petition should be denied.

Respectfully submitted,

THOMAS E. COMBER, JR.,
JOHN D. M. HAMILTON,
Attorneys for Respondent-Appellee.